IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE

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INTEREST OF THE STATE OF MINNESOTA

The State of Minnesota respectfully submits this Amicus Curiae brief pursuant to Rule 42(4) of the United States Supreme Court Rules, 28 U.S.C.A. in support of the Secretary of Labor's (hereinafter "Secretary's") position that his regulation, 29 C.F.R. § 1977.12, is valid and that the Sixth Circuit Court of Appeals' decision[1] from which this appeal arises is well-reasoned and should be affirmed. Whirlpool Corporation (hereinafter "Whirlpool") has appealed from that decision which reversed a lower court's holding that the Secretary's regulation, 29 C.F.R. § 1977.12, was invalid and therefore could not offer protection to two employees who had been reprimanded and suspended by Whirlpool for refusing to walk on mesh screens suspended twenty-five feet above a concrete floor.[2]

The issue in this appeal is the validity of the Secretary's regulation, 29 C.F.R. § 1977.12. The regulation, promulgated pursuant to the Secretary's rulemaking authority under the federal Occupational Safety and Health Act of 1970 (hereinafter "Act")[3] is a narrowly drawn interpretative regulation which permits employees to refuse to work, without reprisals from employers, when faced with on-the-job life-threatening situations, so long as three conditions are met. The three conditions necessary to invoke the protection of the regulation are: (1) the employee's fear that his life is in danger must

[1] *Marshall v. Whirlpool Corporation*, 493 F.2d 715 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188 (October 1, 1979) reversing *Usery v. Whirlpool Corporation*, 416 F. Supp. 30 (N.D. Ohio 1976).

[2] Although the Sixth Circuit Court of Appeals reversed the lower court's holding, the Court of Appeals specifically affirmed the lower court's finding that the employees had refused to work because they feared that the mesh screens would not support them and that they risked falling through the screens to their death.

[3] 29 U.S.C. § 651 *et seq.*

be objectively reasonable; (2) the employee must have been unsuccessful in his attempts to get the employer to remedy the situation voluntarily; and (3) the enforcement mechanisms of the Act must be inadequate.[4] The purpose of the regu-

[4] 29 C.F.R. § 1977.12 provides:

. . . (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) *However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace.* If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. *The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.* (Emphasis added.)

lation is to fill an obvious but uncontemplated gap in the Act's protections afforded to employees who exercise their rights under the Act. This gap arises because the Act does not grant an express right to employees to refuse to work in the face of a life-threatening situation and because the Act's enforcement mechanisms are not adequate for every situation.[5]

The Secretary maintains that the regulation is a reasonable interpretation of the Act's antidiscrimination provision[6] which prohibits employers from discriminating against employees who ". . . exercise any right afforded by the Act." Whirlpool contends that the regulation is inconsistent with the express provisions of the Act and with Congressional intent.

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[5] The Act's imminent danger procedure is the problem. It is a four-step and time-consuming enforcement mechanism. This procedure is as follows:

(1) The employee must request a special inspection and the Secretary must determine that there are reasonable grounds to believe that such an imminent hazard exists. 29 U.S.C. § 657(f)(1);

(2) At the time of the inspection, the inspector must conclude that the imminent hazard exists and he must recommend that the Secretary seek judicial relief and so inform the employee. 29 U.S.C. § 662(c);

(3) The Secretary must seek relief in the district court; and

(4) The Court must determine that the imminent hazard exists. 29 U.S.C. § 662(a).

An additional step may be required if the Secretary arbitrarily fails to seek judicial relief of the imminent hazard. The employee must seek injunctive relief against the Secretary. 29 U.S.C. § 662(d). This procedure can be further delayed if the employer refuses an attempted warrantless inspection. It is for the interim period when the Act's imminent danger procedure cannot be brought into play that the regulation was designed. See also 29 C.F.R. § 1977.12(b)(2) at n. 3 infra.

[6] 29 U.S.C. § 660(c)(1) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding *or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.* (Emphasis added.)

The interest of the State of Minnesota in the outcome of this case is significant. The Minnesota Occupational Safety and Health Act[7] is substantially similar in purpose and substance to the federal Act. In particular, both acts contain substantially identical language prohibiting employers from discriminating against employees who exercise their rights afforded by the respective acts. The State of Minnesota interprets its act to afford protection to employees who refuse to work in the face of a life-threatening situation[8] and Minnesota relies on federal interpretation and precedent to support its position. If this Court should rule against the validity of the federal regulation, and thus, against the implied right of employees to refuse to work in the face of life-threatening conditions, Minnesota's Occupational Safety and Health Act which has as its purpose ". . . to assure so far as possible every working man and woman in the state of Minnesota safe and healthful working conditions to preserve [its] human resources . . ."[9] will be thwarted. Such a decision would place the employees of the State of Minnesota and the nation in the untenable position of choosing between risking their lives or keeping their jobs. Such a result contravenes public policy and common sense. The State of Minnesota urges this Court to uphold the validity of the challenged regulation, thereby continuing the progress this decade has seen in employee safety and health.

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[7] Minn. Stat. § 182 *et seq.* (1978).

[8] A recent Minnesota Supreme Court decision, *Davis v. Boise Cascade Corp.*, No. 49660 (Minn. Sup. Ct., filed December 7, 1979) held, *inter alia*, that the antidiscrimination provision of the Minnesota Occupational Safety and Health Act did not protect an employee who had walked off the job to protest unhealthy working conditions *but who had never reported the alleged violations to the Minnesota Department of Labor and Industry* and thus had not exercised any right afforded by the Minnesota Act. This Minnesota case is inapposite to the issues involved in this appeal.

[9] Minn. Stat. § 182.65, subd. 2 (1978).

SUMMARY OF ARGUMENT

The Secretary of Labor's regulation, 29 C.F.R. § 1977.12, is a valid exercise of the Secretary's rulemaking authority. The regulation fills an obvious but uncontemplated gap in the Act's protection in recognizing the employee's right to save his life without losing his job. As such, it is wholly consistent with the stated purpose, express provisions and structure of the Act.

The challenged regulation's purpose is consistent with the Act's legislative history. Congress never considered the problem that the regulation addresses and Congress' actions regarding a so-called "strike with pay" provision and the imminent danger procedure are not dispositive. The "strike with pay" provision was offensive to Congress because of its coercive nature. It afforded employees an express and unconditional right to receive pay even though absent from work for an indeterminate amount of time and thus provided employees with a means of enforcing compliance with the Act. The rejected proposal was wholly dissimilar to the instant regulation which confers no enforcement powers on the employee and which narrowly circumscribes the conditions under which an employee is afforded the protection of the Act.

The debate in Congress over the imminent danger procedure centered on the potential abuse and due process problems of administrative shut-down orders. The imminent danger procedure was enacted along with the provision affording employees the right to request a special inspection. The two provisions were intended to interact to provide protection to employees as quickly as possible. If Congress had contemplated that the enforcement process could be significantly delayed (as it can be since this Court's holding in *Marshall v. Barlow's,*

Inc., 436 U.S. 307 (1978)), it would have expressly afforded the limited right recognized by the regulation.

ARGUMENT

A NARROWLY DRAWN REGULATION RECOGNIZING THE LIMITED RIGHT OF EMPLOYEES TO REFUSE TO WORK IN THE FACE OF LIFE-THREATENING SITUATIONS IS CONSISTENT WITH THE ACT ON ITS FACE AND IS CONSISTENT WITH THE ACT'S LEGISLATIVE HISTORY.

I. The Regulation Is A Valid Exercise Of The Secretary's Rulemaking Authority.

The principles governing this Court's review of this regulation are well recognized. A regulation will be upheld if it is reasonably related to and consistent with the purpose of the legislation as revealed in its language, structure and legislative history. See *U.S. v. Larionoff*, 431 U.S. 864 (1977); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1978), *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936). Furthermore, where, as in this case, the statute is remedial in purpose and the rulemaking authority, broad, the statute will be liberally construed and great deference will be granted to the agency's interpretation. See, *Udall v. Tallman*, 380 U.S. 1 (1965); *Lilly v. Grand Trunk Western Railroad Co.*, 317 U.S. 481 (1943). See also, *Brennan v. Southern Contractors Co.*, 492 F.2d 498 (5th Cir. 1974); *Usery v. Babcock & Wilson Co.*, 424 F. Supp. 753 (S.D. Mich. 1976). This Court has not hesitated in the past

to uphold agency action designed to render effective the remedial protections of federal legislation (See, *N.L.R.B. v. Scrivener*, 405 U.S. 117 (1972)) or to fashion substantive remedies of its own to effectuate the remedial protections of a statute. See, *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Other courts have freely applied these principles. See, *N.L.R.B. v. Retail Store Employees Union 876*, 570 F.2d 586 (6th Cir. 1978); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Rushton Mining Company v. Morton*, 520 F.2d 716 (3rd Cir. 1975); *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974). The State of Minnesota urges this Court not to depart from sound precedent and to uphold the validity of the regulation.

The interpretative regulation under challenge protects from employers' reprisals those employees (1) who refuse to work out of an objectively reasonable fear that they are faced with a life-threatening situation; (2) who have been unsuccessful in getting their employers to remedy the situation voluntarily, and (3) for whom the Act's enforcement mechanisms are inadequate.[10] Such a narrowly drawn regulation, whose purpose is to state that which of necessity is implied, e.g. that an employee's refusal to work in the face of a life-threatening situation, is an exercise of a right afforded by the Act's anti-discrimination provision,[11] is well within the Secretary's broad rulemaking authority[12] under the Act. Indeed the Court

[10] See n. 4 supra.
[11] See n. 6 supra.
[12] 29 U.S.C. § 657(g)(2). It provides:
(2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this act, including rules and regulations dealing with the inspection of an employer's establishment.

of Appeals' decision in *Marshall v. Daniels Construction Co., Inc.* conceded that "[t]he Secretary's regulation . . . is designed to achieve an end consistent with the purposes of the Act."[13]

II. The Regulation Is Consistent With The Purpose Of The Act.

The regulation in question is patently consistent with the stated purpose of the Act and with the language of the anti-discrimination provision itself. The unequivocal language of the Act's stated purpose ". . . to assure as far as possible the safety and health of the nation's employees and to preserve its human resources . . ."[14] is clearly broad enough to protect from employer reprisals those employees who attempt to save themselves from a life-threatening situation. Indeed, the Act imposes a general duty on an employer to furnish his employees with a work environment that is free from recognized hazards.[15] It is inconsistent with this statutory duty to allow an employer to take action against an employee who, as a last resort, removes himself from a life-threatening situation.

Notwithstanding petitioner's argument to the contrary,[16] the enumeration of employees' rights in the Act is expansive rather than exhaustive. Employees play a central role in assur-

[13] *Marshall v. Daniels Construction Co., Inc.*, 563 F.2d 707, 714 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978). This decision is in direct conflict with the Court of Appeals' decision in the instant case.
[14] 29 U.S.C. § 651(b).
[15] 29 U.S.C. § 654(a)(1).
[16] See Petitioner's Brief at 17-19.

ing that the full protection of the Act is afforded them.[17] The refusal to work in the face of a life-threatening situation during the period when the Secretary cannot be brought to the scene quickly is no less a part in that role than an employee's absenting himself for the express purpose of making a formal request for a special inspection.[18]

The Act's antidiscrimination provision (29 U.S.C. § 660 (c)(1)) cannot be interpreted to restrict its protection to specifically enumerated rights in the Act. Neither the structure nor the logic of the provision supports such a construction. First, the general language protecting employees in their exercise of *any* right afforded by the Act follows upon references to specific rights conferred by the Act (the right to file a complaint, to institute proceedings under the Act, and to testify in any proceeding under the Act). Thus, the structure of the provision itself reveals a progression from a specific to a general catch-all provision. Certainly an employee's narrowly circumscribed right to refuse to work falls within this general language. See, *N.L.R.B. v. Scrivener*, 405 U.S. 117 (1973); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977); *Smith v. Columbus Metropolitan Housing Authority*, 443 F. Supp. 61 (S.D. Ohio 1977); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), certiorari denied, 420 U.S. 938 (1975); *Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385 (D.C. Pa. 1976).

[17] 29 U.S.C. § 655(b)(1) (right to submit information to the Secretary on the need for a standard); 29 U.S.C. §§ 655(b)(6)(A), 655 (b)(6)(B) and 655(d) (variances: right to notice of application for, right to petition for hearing on, right to participate in hearing on, right to petition for modification or revocation; 29 U.S.C. § 655(b)(7) (right to appropriate warnings, protective equipment, and medical examinations); 29 U.S.C. § 655(f) (right to challenge standard); 29 U.S.C. § 657(a)(2) (right to consult privately with inspectors); 29 U.S.C. § 657(c)(1) (right to be informed of employers' obligations under the Act); 29 U.S.C. § 657(c)(3) (right to be informed of monitoring of and exposure to toxic substances); 29 U.S.C. § 657(f)(1) (right to request special inspections); 29 U.S.C. § 657(f)(2) (right to notify Secretary/inspector of probable violations); 29 U.S.C. § 658(b) (right to notice of citation); 29 U.S.C. § 659(c) (right to contest an abatement period); 29 U.S.C. § 660(a) (right to appeal Review Commission's orders to Circuit Courts of Appeals); 29 U.S.C. §§ 660(c)(1), 660(c)(2), 660(c)(3) (right to file complaints, institute proceedings or testify and to file claim with Secretary for employer's discriminatory action and to be informed of Secretary's decision); 29 U.S.C. § 662(d) (right to seek judicial relief from imminent danger if Secretary arbitrarily fails to do so).

[18] The Court of Appeals' decision in the instant case recognizes that this latter act is within the express protection of the Act's antidiscrimination provision. See, *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 723 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188 (October 1, 1979).

In *Phillips, supra*, the Appeals Court construed the federal Coal Mine Health and Safety Act's antidiscrimination provision to protect an employee who refused a hazardous work assignment after repeated unsuccessful attempts to get his foreman to remedy the situation. The court reasoned that such refusal was an implied first step in the complaint procedure[19] and was thus clearly protected by federal law. That provision mentioned only specific rights such as the right to file a complaint, institute a proceeding or testify in a proceeding and did not contain language protecting *any right* afforded by the Act.[20] In 1977, when Congress considered what was to be the

[19] Although the company had a complaint procedure, the first step of which was to bring the complaint to the foreman's attention, employees' rights should not hinge on whether or not the company is enlightened enough to develop an internal complaint procedure. See, *Marshall v. Whirlpool Corp.*, 593 F.2d at 735 n. 18 (6th Cir. 1979).

[20] The Mine Coal Health and Safety Act, 30 U.S.C. § 820(b)(1) provided:

> (b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.*, it approved the *Phillips* Court's construction of the Coal Mine Safety and Health Act's antidiscrimination provision and specifically amended the antidiscrimination provision to include the following language:[21]

> "No person shall discharge or in any manner discriminate . . . [against a miner, representative of miners or applicants] . . . *because of the exercise by such miner, representative of miners, or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.*" (Emphasis added.)

The antidiscrimination provision of the federal Mine Safety and Health Amendments Act of 1977 as amended to afford

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[21] 30 U.S.C. § 815(c)(1) provides:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or *because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.*

(Emphasis added.) See 1977 U.S. Code Cong. & Ad. News at 36. With respect to the federal Mine Safety and Health Amendments of 1977 which amended the Mine Safety and Health Act's antidiscrimination provision, the Senate report said that it was Congress' intent "to insure the continuing vitality of the various judicial interpretations of the [antidiscrimination provision] . . . which are consistent with the broad protection of the bill's provisions . . . ."

protection to the exercise of any right afforded by the act is substantially identical to the antidiscrimination provision in this case. The conclusion is inescapable that Congress intended that such language which affords protection to *the exercise of any right* under the *acts be broad and cover all rights*, express or implied, whether specifically conferred or not.

A broad construction of the language of the antidiscrimination provision is, however, not necessary. The right recognized by the regulation here neither enlarges rights expressly conferred by the Act nor creates a new right. The regulation states the obvious. An employee's attempt to save himself is an implied first step in a complaint procedure which is expressly protected by the antidiscrimination provision. To withhold that protection unless the refusal is contemporaneous with the initiation of a complaint creates an absurdity. *Compare* the lower court's opinion herein, *Marshall v. Whirlpool Corp., supra*, at 723 (noting that the Act's protections ". . . should not hinge on whether an employee knows enough to keep within OSHA's protections by making obvious efforts to find an OSHA inspector immediately.") *with Marshall v. Daniels Construction Co., Inc., supra* at 716 (where the court suggested that the employee may have been able to avail himself of the protection of the Act if he had alleged that he was fired ". . . for temporarily absenting himself from his job so that he might request an OHSA inspection and give notice of the dangerous condition.").

Finally, there are no countervailing considerations. Whirlpool's suggestion that the National Labor Relations Act (hereinafter "NLRA") controls the area of an employee's right to refuse work in the face of a life-threatening situation and that the Secretary's regulation would seriously disrupt pre-

vailing labor-relations policy is without merit.[22] Indeed, Whirlpool's reliance on Section 502 of the NLRA, 29 U.S.C. § 143,[23] is misplaced. The regulation under challenge in this appeal neither enlarges nor creates employees' rights that do not already exist under Section 502. Thus, Section 502 lends support to the Secretary's position that his regulation neither disrupts labor-management relations nor conflicts with Congressional intent. Whirlpool suggests that cases may arise where there is a fine distinction between a labor relations issue such as insubordination and the exercise of a right protected under the Act and that such cases are better resolved in other forums.[24] The courts are eminently well equipped to deal with the factual and jurisdictional issues. See, e.g. *Phillips v. Interior Board of Mine Operations Appeals, supra*; *Smith v. Columbus Housing Authority,* 443 F. Supp. 61 (S.D. Ohio 1977); *Davis v. Boise Cascade Corp.*, No. 49660 (Minn. Sup. Ct., filed December 7, 1979). The specter of endless litigation should not mislead this Court into choosing efficient court administration over employees' lives.

In sum, the regulation, 29 C.F.R. § 1977.12, is wholly consistent with the purpose, structure and language of the Act, is well within the Secretary's rulemaking authority and is grounded in sound public policy.

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[22] See Petitioner's Brief at 19.

[23] 29 U.S.C. § 143. It provides:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

[24] See Petitioner's Brief at 16.

III. Nothing In The Legislative History Of The Act Suggests That Congress Intended To Deny Employees The Right To Refuse To Work In Life-Threatening Situations.

Whirlpool argues that two events in the legislative history of the Act[25] indicate that Congress deliberately withheld

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[25] See 116 Cong. Rec. 36508-09, 36511-523, 35629-39; 37317-347; 37601-40; 38366-403; 38702-38733; 41753-764; 42199-209; 1970 U.S. Code Cong. & Ad. News 5177-5241. An able synthesis of this history was made by Circuit Judge Keith in the Court of Appeals decision below and is set forth below:

> We begin our study of the legislative history of the Occupational Safety and Health Act with the so-called Daniels Bill, H.R. 16785 (1970), which was reported out of the House Education and Labor Committee. The Daniels Bill contained a subsection 19(a)(5), which allowed employees to absent themselves from their job, with pay, when exposed to substances which had a potentially toxic or harmful effect when found or used at certain levels in the workplace, unless their employer provided appropriate warning labels and protective equipment which allowed them to carry out their work without being harmed. Opponents of the Bill attacked this subsection as guaranteeing workers the right to "strike with pay," a label which proved to be its downfall. Unhappy with this and other provisions in the Daniels Bill, Congressman Steiger of Wisconsin introduced a substitute bill on the floor of the House which *inter alia* did not contain a "strike with pay" provision. See H.R. 19200 (1970), reprinted in Legislative History at 763.
>
> Confronted with strong opposition on a variety of grounds, Congressman Daniels responded, *inter alia,* by offering to substitute a provision giving employees the right to request that the Secretary immediately inspect the premises. He explained:
>
> > 'The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk or harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.'
>
> 116 Cong. Record, 38377-78 (1970), reprinted in Legislative History at 1009. See also 116 Congressional Record 38369 (1970), reprinted in Legislative History at 936 (Congressman Perkins); 116 Congressional Record 38376 (1970), reprinted in Legislative History at 1005 (Congressman Daniels).
>
> Notwithstanding Representative Daniels' efforts to make his own bill more palatable, the House voted it down and instead

from employees a right to refuse to work in the face of a life-threatening situation. Those two events were Congress' rejection of the so-called "strike with pay" provision and its enactment of the imminent danger procedure.

A. "Strike with Pay."

In the course of the debates over the passage of the Act, Congress reacted negatively and rejected the House (Daniels) Bill's so-called "strike with pay" provision. This provision would have permitted employees to protect themselves from the adverse effects of their exposure to toxic substances by absenting themselves from work with pay.[26] It is easy to understand why such a provision was offensive to Congress. The provision would have given employees an unconditional right to refuse to work for an indefinite period and to get paid for not working. An employer's work operation could be seriously disrupted in situations where the hazard was less than imminent. It is apparent that it was the coercive potential of this provision which gave enforcement powers to employees which disturbed the Congress. In presenting an amendment which would have deleted the "strike with pay" provision but which would have given employees the right to request an immediate inspection, Representative Daniels said:

> [I]nstead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, *we have strengthened the enforcement* by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.

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passed the alternative Steiger bill. That bill said nothing about employees walking off the job, but allowed the Secretary to obtain temporary restraining orders from a Federal Court to enjoin imminent dangers in a workplace. If the Secretary unreasonably failed to seek this relief, an employee who was injured as a result could sue the United States in the Court of Claims.

Action in the Senate began with the reporting out of Committee of the Williams Occupational Safety and Health Bill. The Williams Bill did not contain a "strike with pay" provision. However, it did provide that in imminent danger situations, an employee had the right to make a written request for an immediate inspection. Although the Williams Bill had some controversial provisions, it survived intact and passed the Senate.

In House-Senate Conference, the Senate was largely successful in retaining the provisions of the Williams bill. In particular, the Senate's provision, giving employees the additional right to contact the Secretary and to get an inspector on the scene at once was acceded to by the House. Conference Report No. 91-1765, reprinted in Legislative History at 1154, 1164-65; 1190-1191 and reprinted in 1970 U.S. Code Cong'l and Admin. News 5228, 5334. The Act as finally adopted incorporates this compromise. 29 U.S.C. § 657(f).

Marshall v. Whirlpool Corp., 593 F.2d at 727-30 (6th Cir. 1979) cert. granted, 48 U.S.L.W. 3188 (October 1, 1979).

[26] This section (§ 19(a)(5) of the Daniels bill) provided:

> The Secretary of Health, Education and Welfare shall publish within six months of enactment of this Act and thereafter as needed, but at least annually, a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potential toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substances designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period. H.R. 16785 § 19 (a), (1970), reprinted in Legislative History at 755-56, and reprinted in H. Rep. No. 91-1291, 91st Cong. 2d Sess. 12 (1970), reprinted in Legislative History at 842.

116 Cong. Rec. at 38377-78 (1970) (Emphasis added.) In preferring a right to request an immediate inspection over the indeterminate right of employees to absent themselves from a toxic environment, Congress merely expressed an intent to confine the enforcement of the Act to the appropriate federal or state agencies. Congress did not want to enable employees to *enforce* an employer's compliance with the Act's provisions. Congress found it desirable instead to enable an employer to trigger an enforcement inspection as quickly as possible. A limited right to refuse work as an interim step to initiating the inspection procedure is consistent with the intent of Congress to limit enforcement to the respective government agencies.

The Secretary has not attempted by the promulgation of 29 C.F.R. § 1977.12 to circumvent congressional intent. The regulation in question is not a "strike with pay" regulation.[27] The regulation applies only in life-threatening situations where statutory enforcement mechanisms are inadequate. It confers no enforcement powers on the employee and creates no rights not already available under § 502 of the NLRA.

[27] See, *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979), cert. granted 48 U.S.L.W. 3188 (October 1, 1979). In emphasizing the total dissimilarity between 29 C.F.R. § 1977.12 and the proposed strike with pay provision, the Court of Appeals noted that it was the monetary incentive that Congress rejected. Whether or not an employee can receive pay for the exercise of his rights under 29 C.F.R. § 1977.12 is not dispositive of the regulation's validity, however. The employee's right is hardly unconditional. The employee must meet the burden of proof that all the conditions of the regulation have been met.

B. "Imminent Danger" Procedure.

The legislative history surrounding the enactment of the Act's imminent danger procedure (29 U.S.C. § 662) demonstrates that Congress did not intend the imminent danger procedure to be the exclusive remedy of employees faced with a life-threatening situation. The Congressional debate on the imminent danger procedure focused on the due process and political problems associated with the issuance of an administrative, rather than a judicial, shut-down order.[28] That employees might cause a shut-down was not discussed. Indeed, such actions by employees was not a concern given Congress' awareness of said employee's rights under the NLRA.[29]

The imminent danger procedure is a mechanism whereby governmental enforcement is triggered. Its enactment cannot be construed as an attempt to foreclose employees' right to refuse to work to save themselves from a life-threatening situation.

[28] See, e.g. 116 Cong. Rec. at 37326 (Senator Williams) (Speaking on an inspector's authority, upon consultation with the Secretary, to order a 72 hour shut-down: "The committee adopted a number of amendments to provide every assurance that this authority would not be used arbitrarily or unnecesarily, nor in a manner to cause undue economic harm."); 116 Cong. Rec. at 37338 (Senator Dominick) ("[A]ll he has to do—one man, as an inspector—is to call the regional office or somebody else in the Labor Department and shut down the whole plant immediately, by an order, without any court findings, without any adjudication, without any due process."); 116 Cong. Rec. at 37346 (Senator Tower); 116 Cong. Rec. at 37602 (Senator Saxbe); 116 Cong. Rec. at 37602 (Senator Schweiker); 116 Cong. Rec. at 38368 (Rep. Anderson) (The judicial order is "more responsible and equitable than granting this arbitrary power to an inspector."); 116 Cong. Rec. at 38376 (Rep. Daniels); see also, 1970 U.S. Code Cong. & Ad. News 4189-90, 5221, and 5227 (Minority Views of Dominick and Smith).
The proposed provisions that would have allowed an inspector, either on his own or after consultation with the Secretary or his regional representative, to issue a shut-down order were rejected in favor of the provision requiring a court order. See 29 U.S.C. § 662.

[29] See, 116 Cong. Rec. at 422.

Finally, one aspect of the legislative history surrounding the enactment of the imminent danger procedure is most revealing of what Congress would have done had it specifically addressed the issue of employees' right to withdraw from a life-threatening situation during the interim period when the Act's enforcement mechanisms cannot be brought into play. The Act as adopted contains both an employee right to request an immediate safety and health inspection and a provision permitting the Secretary to obtain a judicial shut-down order. Congress understood that these two provisions would interact so that enforcement could proceed expeditiously thereby minimizing employee exposure to imminent hazards. Congress did not consider that these procedures would not be adequate. See, e.g. 116 Cong. Rec. at 37338 (Senator Dominick) (Regarding the substitute bill's provision requiring judicial action to shut down a plant: "You can get an ex parte order in a half hour. Therefore, there is no merit to the argument that employees will be subject to hazards they shouldn't be."); 116 Cong. Rec. at 37340-41 (Senator Williams) Regarding the right to request immediate inspections: "The substitute bill has absolutely no comparable provision for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled."); 116 Cong. Rec. at 37602 (Senator Schweiker); 116 Cong. Rec. at 38376 (Representative Daniels) (Regarding his amendments deleting the "strike with pay" provision and adding an imminent danger procedure relying exclusively on judicial action: "Our intention is that the Secretary resort to the courts with utmost speed . . . [and] our provision reflects our trust that the courts will be able to respond with the speed that is needed.") See also, Sen. Rep. No. 91-1282 (The Committee on Labor and Public Welfare), 1970 U.S. Code Cong. & Ad. News at 5188.

Indeed Congress intended that special inspections would proceed "without delay."[30]

However, that presumption was predicated on: (1) employer willingness to remove employees from an imminent danger voluntarily; (2) round-the-clock accessibility of the Secretary or his agents; and (3) the swiftness of the judicial process. See, e.g. 116 Cong. Rec. 37341 (Sen. Williams); 116 Cong. Rec. at 37602 (Sen. Saxbe); 116 Cong. Rec. at 38376 (Rep. Daniels). Unfortunately, Congress' confidence in the accuracy of these presumptions has not been supported. Obviously, not all employers will cooperate by voluntarily removing imminent dangers from workplaces. Furthermore, this Court's decision in *Marshall v. Barlow's, Inc., supra*, acknowledging an employer's Fourth Amendment right to refuse a warrantless safety and health inspection, has significantly impaired the protection afforded employees by the imminent danger procedure. The employer's exercise of his Fourth Amendment rights significantly delays the Act's imminent danger procedure because the Secretary is forced to seek a warrant. Without the protection of the regulation under challenge, employee exposure to life-threatening hazards is significantly prolonged during the time it takes the Secretary to obtain a court order. Congress did not intend the Act's imminent danger procedure to be meaningless in some circumstances. The remedial effect of the Act in life-threatening situations cannot depend solely on the willingness of an employer to waive his constitutional rights. The Court should uphold the validity of the Secretary's regulation which recognizes a very reasonable but limited protection for employees. Such protection is inherent in the Act.

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[30] 29 U.S.C. § 657(a)(1).

Employee safety was not bargained away when Congress included an imminent danger procedure within the Act's protections. Employees must retain a minimum right to withdraw from life-threatening situations and to do so without fear of employer reprisals. An employee should not have to choose between his job and his life.[31]

[31] In his dissenting opinion in the *Daniels* decision, Judge Minor Wisdom said:
"The Congress that passed this Act did not intend to put the worker to the choice—his job or his life . . . Congress felt that workers could live with the proscribed processes of this Act. I cannot believe that it required workers to die for them . . .".
Marshall v. Daniels Construction Co., Inc., 563 F.2d at 722.

CONCLUSION

For the foregoing reasons, the State of Minnesota urges this Court to affirm the decision of the Sixth Circuit Court of Appeals and uphold the validity of the Secretary's regulation, 29 C.F.R. § 1977.12.

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Respectfully submitted,

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